IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Second Appeal No.390 of 2004
With
Civil Application No.317 of 2003

Premanand Damodar Rupwate & anr. Appellants
Vs.
Mayfair Arihant Associates & ors. Respondents

Mr.S.D.Rupwate for appellants.
Mr.R.R.Salvi for resp.nos. 1 to 3.

CORAM: B.H.MARLAPALLE, J.

Reserved on : April 23, 2007.
Pronounced on : June 05, 2007.

ORDER :

1. This appeal arising from the judgment and decree dated 2/8/1988 passed by the learned Jt. Civil Judge, Junior Division at Pune in Regular Civil Suit No.1037 of 1985 and duly confirmed by the learned 4th Addl. District Judge at Pune by dismissing Civil Appeal No.775 of 1989 on 4/1/2002 has been waiting for admission for the last more than five years. It was filed in April 2002 and registered as Second Appeal (Stamp) No.16618 of 2002 and it was pending for almost two years under the office objections.

2. By filing Civil Application Stamp No.10566 of

2007 the defendants have brought on record certain documents in this Second Appeal pointing out that the original plaintiffs have sold the suit plot to M/s. Mayfair Arihant Associates, a partnership firm represented by two of its partners viz. Shri Jatin Arvind Solanki and Shri Irfan H. Shaikh and they had prayed for the plaintiffs to be replaced by the purchasers. By the order dated 28th March 2007 the application was allowed for amendment and to bring on record the present owners of the suit property in place of the original plaintiffs. The new owners who are added as respondent nos.1 to 3 in the instant Second Appeal have also supported the decree passed by the trial Court and confirmed by the lower Appellate Court. They denied to have arrived at any compromise with the defendants and opposed the appeal through the arguments advanced by their learned Advocate.

3. RCS No.1037 of 1985 was filed by the original owner-plaintiff of the suit property viz. Survey No.342-1B, Sangamwadi Town Planning Scheme (Final Plot No.108) originally admeasuring 11 Rs and purchased by the plaintiff on 29/1/1958 by a registered sale deed in execution of a decree passed

by the Civil Court. The plaintiff had alleged that on the Western side of the suit plot Survey No.342-1A (Final Plot No.107) is located and the defendants had constructed a multi-storeyed building of Sajanabai Bhandari Vidyalaya run by the Bahujan Shikshan Sangha, a Society registered under the Bombay Public Trust Act, 1950 and Defendant No.1 at the relevant time was the Managing Trustee whereas the defendant no.2 was the Head Master of the said school. The construction of the multi-storeyed building for the school was done in the year 1971-72 and while doing the same an area admeasuring 1350 sq. ft. (5 ft. x 270 ft.) of the suit plot was encroached upon. The defendants had also encroached upon Survey No.342-2 to 5 belonging to one Shri Pitti who was an influential person and when he realised the encroachment, he was successful in removing the said encroachment made by the defendants from his property. The plaintiff was not successful in persuading the defendants to remove the encroachment and, therefore, the Government Surveyor measured the property on 19/2/1973, Survey Report was made available on 16/3/1973 and in the same it was found that an area admeasuring 5 ft. x 270 ft. South-North was encroached upon by the defendants

while constructing their school building. The plaintiff approached the defendants from time to time to remove the encroachment and finally in the year 1975 the defendants clearly told the plaintiffs that they would not remove the same. The plaintiff further alleged that from the academic year 1976-77 the defendants started using the suit plot as a playground for their school and when the plaintiff approached them to stop using the open area of the suit plot as a playground, the plaintiff was informed that the defendant no.1 being an influential social worker and a politician, due steps would be taken for acquisition of the entire suit plot. The plaintiff, therefore, waited till the year 1983 and no further progress was noticed for acquisition of the plot and, therefore, he issued a notice dated 9/5/1983 calling upon the defendants to remove the encroachment made by way of construction (1350 sq. ft.) and stop using the open plot as a playground for the school. As there was no response, the plaintiff filed the suit on or about 26/4/1985.

4. The defendants filed their Written Statement at Exhibit 13 and opposed the suit on the preliminary point as well as on merits. They stated that the

suit property was not correctly described, they were not aware about the title of the plaintiff, they denied the encroachment as alleged by the plaintiff and contended that the property in dispute was in their possession since the beginning and it is their property. They further submitted that the building was constructed in the year 1971 and the plaintiff was aware of the same. However, the plaintiff approached the Court for the first time in April 1985 and, therefore, the suit was beyond limitation. They also contended that they were enjoying the suit property openly and with the knowledge of the real owner who did not take any objection for the encroachment and, therefore, the defendants had become the owners of the property by adverse possession. In the alternative it was claimed that the defendants had the right over the suit property by way of easementary right and, therefore, the plaintiff could not recover the possession and he had no right to do so. They also claimed that they were not aware of the measurements carried out by the City Survey Officer and denied the notice issued by the plaintiff. They also claimed that the suit plot was subjected to the Urban Land Ceiling Act and, therefore, the plaintiff had no right to recover the

same. In the course of trial of the suit, the plaintiff examined himself on oath and relied upon the documents produced along with the list at Exhibit 3, the sale certificate issued in the name of Shri D.R. Limaye, the plaintiff's father and the sale deed executed by Shri Limaye. He also produced the tax bills and receipts at Exhibits 30 to 30/1-C, letter sent by the Arbitrator to the plaintiff on 21/4/1969 at Exhibit 32, notice sent by the Town Planning office dated 1/12/1981 in respect of the reservation of the suit property for widening of the road at Exhibit 33, the map prepared by the Town Planning officer showing the particular portion acquired by the Town Planning office at Exhibit 34. Letter to the Town Planning officer at Exhibit 35, second letter at Exhibit 36 and the documents submitted by the City Survey Officer at Exhibits 38 to 40. The defendant no.2 was examined in support of the case of the defendants and one additional witness who was the ex-student of the said school was examined as DW 2.

5. The defendant no.2 in his depositions admitted the fact that there was barbed wire between the Final Plot No.108 of the plaintiff and Final Plot No.107 of

the defendants. The title of the plaintiff was duly proved on the basis of the registered sale deed and thus there was no dispute that the plaintiff was the owner of the suit plot. So far as the measurements of the suit plot conducted by the City Survey Officer on 19/2/1973 is concerned, the plaintiff had placed on record the measurement report, the map drawn by the City Survey Officer (Exh.39). The defendant no.2 in his depositions before the Court had admitted that when the City Survey Officer carried out the measurements over the suit plot he was personally present, he signed the report and the map was drawn by the said Officer. He further admitted that he had not taken any objection for the measurements of the property and the observations made by the Surveyor regarding the encroachment. The map at Exhibit 39 clearly indicated that the occupier of Final Plot No.107 had encroached upon the Final Plot No.108 to the extent of 1350 sq.ft. constructed area. Thus the encroachment made by the defendants over the suit plot while constructing a multi-storeyed school building was also proved before the trial Court by leading evidence. Though DW 2 stated that the school building was constructed in the year 1970, the trial Court considered the documentary evidence and

recorded a finding that the school building was constructed in the year 1971.

6. On the point of limitation the trial Court noted that though the encroachment was noticed on 19/2/1973 by the City Survey Officer and as per his report dated 16/3/1973, the plaintiff came out with a specific case that the defendants refused to remove the encroachment in the year 1975 and in the next academic year 1976-77 onwards they started using the remaining open area of the plot as the playground of their school. The plaintiff also claimed that as and when he approached the defendants from 1975-76 onwards they went on informing him that the suit plot would be acquired for the purpose of school by the State Government under the Land Acquisition Act, 1894 and, therefore, the plaintiff need not worry about the encroachment. The defendants produced some documents along with the list Exh. 43. Exhibit 52 is a letter written by defendant no.2 to the then Chief Minister of Maharashtra State on 5/5/1983 requesting to acquire the suit plot for the purpose of the school under the Land Acquisition Act, 1894. One more letter dated 10/9/1984 at Exhibit 54 written by the defendant no.2 to the City Engineer of the

Pune Municipal Corporation was also brought on record and by this letter the defendant no.2 had requested the City Engineer to take due steps for acquiring the suit plot. Thus from 1973 to 1984 there was continuous cause of action and the suit filed was not beyond limitation, as per the trial Court. The trial Court further held that for the open plot being used for playground rental charges at Rs.100/- per month would be reasonable amount and the defendants shall be liable to pay the same for a period of three years prior to the filing of the suit. Accordingly the suit was allowed and the defendants were directed to hand over the vacant possession of the encroached portion i.e.1350 sq.ft. to the plaintiff by removing the structure standing on it and to pay damages of Rs.3600/- and also to pay further damages at the rate of Rs.100/- per month from the date of suit till the possession is handed over. The defendants were restrained by an order of perpetual injunction not to obstruct the plaintiff's possession in the suit property and there was further injunction not to use or allowed to be used the vacant plot as a playground.

7. In Civil Appeal No.775 of 1989 two additional

preliminary points were raised by the defendants viz. failure of the plaintiff to specifically describe the suit property (encroached portion) and, therefore, as per the provisions of Order VII, Rule 3 of CPC the suit was not tenable. Secondly it was contended that though the plaintiff had averred that the defendants had made encroachment on the western side to the extent of 1350 sq.f.t. and had prayed for decree of possession of entire land admeasuring 11 Rs, the suit was not tenable. Both these contentions were rejected by the lower Appellate Court. On merits the lower Appellate Court examined the documentary as well as oral evidence adduced before the trial Court as well as the oral evidence of the plaintiff, the defendant no.2 and Maruti (DW 2) an ex-student of defendant no.2 and held that the findings recorded by the trial Court in decreeing the suit did not suffer from an infirmities and the decree was confirmed.

8. The lower Appellate Court noted the depositions of the plaintiff regarding the measurement undertaken by the City Survey Officer on 19/2/1973 and the notice at Exhibit 38 issued by the said officer to the defendants to remain present for the said measurements. Defendant no.2 admitted in

his depositions before the trial Court about his presence when the measurement was carried out. The evidence of Yatin - PW 2, the photographer was also considered. The survey map at Exhibit 39 clearly indicated an encroachment of construction of building to the extent of 5 ft. x 270 ft. and the defendant no.2 had not denied the report of the Surveyor. The learned counsel for the defendants had submitted before the lower Appellate Court that the plaintiff failed to examine the surveyor and this report was not proved. The lower appellate Court discarded these submissions by relying upon the provisions of Section 83 of the Evidence Act. It noted that when the survey map was prepared by the competent authority and the defendant no.2 admitted that he was present when the said survey was carried out and he had signed on the report made by the Survey Officer (exh. 40) and the DW 2 Maruti in his cross-examination had admitted that there was a wire fencing between the two plots initially, failure to examine the city survey officer would not in any way weaken the plaintiff's case. The lower Appellate Court also noted that the description of the suit property and more particularly the encroached portion though was not given, the map at Exhibit 39 along

with the statement at Exhibit 40 clearly indicated the encroached portion admeasuring 5 ft. x 270 ft. and when the boundaries of the entire suit property were properly mentioned, there was no failure so as to hold that the suit was not maintainable for breach of or non-compliance of Order VII, Rule 3 of CPC (Bombay Amendment). The defendant no.2 had not denied the signature on the statement at Exhibit 40 recorded by the City Survey Officer while undertaking the measurements and above all the defendant no.2 admitted that the defendants had made encroachment on the plaintiff's property to the extent of 5 ft. width and 105 ft. in length. He further admitted in his cross-examination that he was present when the Surveyor measured the plaintiff's property and that the defendant no.2 did not take any objection. He also admitted that his signature was obtained by the Surveyor on the statement. Thus the issue of encroachment by the defendants on the suit plot was confirmed by the lower Appellate Court.

9. On the issue of limitations, the lower Appellate Court rightly noted that there was continuous cause of action in asmuchas after the encroachment was noticed in the measurement carried

out on 19/2/1973 by the City Survey Officer, he approached the defendants from time to time and in the year 1975 they flatly refused to remove the encroachment. The plaintiff's evidence further proved that in the year 1976-77 onwards the open portion of the suit plot was being used by the defendant no.2 - school as a playground. The two documents i.e. letter dated 5/5/1983 (Exh.52) and letter dated 9/5/1979 (Exh.53) also indicated that the defendants had approached the State Government requesting to acquire the suit plot for the school under the Land Acquisition Act, 1894. The last such request was to the City Engineer of the Pune Municipal Corporation by letter dated 10/9/1984 (Exh. 54). On the face of this evidence regarding the continuous cause of action till 1984, both the Courts below were right in rejecting the plea of the defendants regarding limitations and they rightly held that the suit filed was within the limitations.

10. Coming to the plea of ownership by adverse possession both the Courts below have concurrently noted that the encroachment was opposed by the plaintiff from time to time and the plaintiff had also made representation not to use the open area of

the suit plot as a playground. Plaintiff was not keeping quiet and, therefore, it could not be held that the possession was adverse to the title of the plaintiff. It is well settled that in order to make out a case of adverse possession, firstly the person claiming adverse possession must admit the ownership of possession against whom they are claiming title and secondly there should be specific averment that the possession is hostile to the true owner from any specific date and such hostile possession should be continuous for 12 or more than 12 years. In the instant case there were no such specific pleadings set out by the defendants and on the contrary the documents at Exhibit 52 - letter dated 5/5/1983, Exhibit 53 - letter dated 9/5/1979 and Exhibit 54 - letter dated 10/9/1984 by the defendants with a request to acquire the suit land for the purpose of their school falsify the defendants' case of being in possession hostile to the true owner. The defendants also did not disclose as to when they had denied the plaintiff's title to the suit land. The easementary rights were claimed on the open space being utilised as a playground. As noted earlier, when the plaintiff had opposed for such use, the evidence on record clearly proved that the defendants had

approached the State authorities i.e. the Deputy Director of Town Planning, the Chief Minister of Maharashtra and the City Engineer, Pune Municipal Corporation right from 9/5/1979 till 10/9/1984 with a request to acquire the suit plot in its entirety for the defendant no.2 - school and the plaintiff had issued notice dated 9/5/1983 (Exh. 41) to the defendants to remove the encroachment as well as to stop utilising the open space as a playground. The lower Appellate Court, therefore, confirmed the decree of the trial Court by dismissing the appeal. The learned counsel for the appellants relied upon the decision in the case of Tej Narain and anr. Vs. Shanti Swaroop Bohre and anr. **[(2004) 11 SCC 193]** in support of his plea for adverse possession as well as limitations. As noted earlier, in the facts of this case both the Courts below have concurrently held against the defendants and rightly so. The law laid down in Tej Narain's case is not applicable in the facts of the instant case.

11. For the reasons stated hereinabove, the concurrent findings recorded by both the Courts below on the factum of encroachment by construction to the extent of 1350 sq. ft. and the use of the open

space as a playground for the school does not involve any substantial question of law. Similarly the issue of limitation and ownership by adverse possession decided against defendants by both the Courts below also do not raise any substantial question of law in this second appeal. Consequently the appeal must fail at the threshold and hence the same is hereby dismissed in limine. Ad-interim order, if any, stands vacated.

12. Civil Application No.317 of 2003 does not survive and the same stands dismissed.

(B.H.MARLAPALLE,J.)

. The learned counsel for the appellants submitted an oral application for stay to this order and further stated that the execution proceedings are pending as of now. The oral application is rejected, more so when there is no stay order operating in favour of the appellants as of now.

(B.H.MARL